Testimony of
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Mr. Chairman, Distinguished Members of the Committee:

My name is Anthony T. Pierce, and I am a partner in the law firm of Akin, Gump, Strauss, Hauer & Feld, L.L.P. I am a member of Akin, Gump's Year 2000 practice group, and as a practitioner in this area, I advise domestic and international clients on legal issues associated with the year 2000 computer problem. My work includes the performance of confidential and privileged legal risk assessments designed to evaluate potential claims and remedies that business entities may have, as well as the representation of clients with regard to year 2000 litigation. I appreciate the Opportunity to testify before this Committee. I would like to note that the testimony I give today does not necessarily represent the views of any Akin, Gump client. Consistent with the focus of this hearing, my testimony will address year 2000 liability and the measures proposed in S. 96, the Y2K Act, to limit that liability. I ask that a copy of my written statement be included in the record.

In basic terms, the year 2000 computer problem refers to the fact that, until recently, computer software programs, as well as computer hardware and embedded microprocessors in non-computer equipment, were made with internal time counters that represent the year in date codes with only two digits, rather than four. For reasons with which the Committee is familiar, this '~short hand" date coding was done in years past to save valuable, and expensive, computer memory. And, as this Committee is also well aware, it is anticipated that unless all such date

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codes are identified and fixed, potentially enormous computer failures and complete system breakdowns may occur when we reach January 1, 2000, when most computers will read the year as "00" and could interpret that as 1900, rather than 2000. Analysts have estimated that the costs to fix the year 2000 computer problem for public and private entities in the U.S will range from $78 billion to $89 billion. ~ Stephen Barr, "Industry's 'Fix' for Y2K Liability: Legislative Proposal Would Limit Lawsuits and Damages," The Washington Post, Feb. 3, 1999, at A 15.

The Y2K Act encourages businesses to address their year 2000 readiness and to develop strategies to become year 2000 compliant by thoughtfully balancing liability for year 2000 systems failures with the recognition that potential defendants that have made good faith efforts to remedy their year 2000 problems should not become subject to the types of punitive damages awards that have proliferated with the rise of mass tort litigation. Together with the recently enacted Year 2000 Information and Readiness Disclosure Act, Pub. L. No.105-271, which encourages businesses to share information about their level of year 2000 readiness and their tools and strategies to become year 2000 compliant in order to improve their year 2000 readiness, the Y2K Act will provide a real and valuable incentive to businesses to direct their resources toward remedying potential year 2000 failures before they happen. Consistent with the purposes of the Y2K Act, I will suggest today that this Committee consider two additional provisions: (I) recognizing a self-evaluative privilege prohibiting the use against a defendant of documents evidencing the defendant's evaluation of its year 2000 readiness and compliance status; and (2) prohibiting multiple punitive damages awards.

Overview

A virtually certain consequence of the year 2000 computer problem will be widespread litigation resulting from date-related failures. Indeed, there have already been a number of year 2000 lawsuits, particularly class-action suits involving software failure, product and system failures, and shareholder suits arising from claims that a company's year 2000 problems and costs of remediation were not fully disclosed. See, e.g. Capellan v. Svmantec Corp., No. CV772484, and Cameron v. Symantec Corp, No. CV72482 (Calif. Super. Ct., Santa Clara Co.) Plaintiffs demand a free copy of the upgrade of the Norton anti-virus software); Peerless Wall & Window Coverings Inc. v. Synchronics Inc., No.981084 (W.D. Pa.) Plaintiff's complaint requests costs of upgrading non-compliant software and hardware); Young, as a representative of Andersen Consulting v. J. Baker Inc., No.98-01597 (Mass. Super. Ct., Norfolk Co.) (Andersen sued for declaratory judgment that it had fulfilled obligations to J. Baker in installing a new operating system in the late 1980s that was not year 2000 compliant); Ehlert v. Singer, No. 8:98cv02168 (M.D. Fla.) (shareholders sued for devaluation of shares allegedly caused by the number of suits filed against the company, alleging that it was not disclosed that company intended to require the purchase of an upgrade). Suits to date have sought damages in the millions of dollars, and there has been at least one case settlement payment of $1.4 million.

A Self-Evaluative Privilege Would Encourage Businesses to Address Their Year 2000 Problems The Committee might consider inclusion in the Y2K Act of a provision for a self-evaluative or self-assessment privilege. This would provide that any evidence of a defendant's evaluation of its year 2000 problems, readiness, and compliance status would not be admissible in litigation against that defendant. I note that such a privilege is under consideration in Virginia.

Virginia Senate Bill 1013, introduced on January 19, 1999, would create a year 2000 assessment privilege rendering inadmissible in litigation information relating to the year 2000 readiness status of a computer system. The National Association of Manufacturers has also included such a self-assessment privilege in its model legislation.

A self-evaluative or self-assessment privilege would further the Y2K Act's goal of encouraging businesses to address their year 2000 problems, complementing the steps taken by the Year 2000 Information and Readiness Disclosure Act in providing an evidentiary exclusion for year 2000 readiness disclosures. The Year 2000 Information and Readiness Disclosure Act took important steps in encouraging businesses to share information about their year 2000 readiness status and tools and strategies for becoming year 2000 compliant by immunizing businesses from liability for statements made in good faith to third parties and by providing an evidentiary exclusion for statements designated as year 2000 readiness disclosures. However, in protecting businesses for good faith statements made to third parties, the Year 2000 Information and Readiness Disclosure Act only did half the job. To fully accomplish the goal of encouraging businesses to become year 2000 ready, free from the daunting deterrent of litigation liability, a self-evaluative or self-assessment privilege is necessary to protect businesses' internal documentation that evaluates their year 2000 readiness status, the internal counterpart to the third party statements already protected by the Year 2000 Information and Readiness Disclosure Act.

There is a precedent for such a privilege in Federal Rule of Evidence 407, which does not allow the admission of evidence of subsequent remedial measures taken to prove negligence, culpable conduct, product or design defect, or a need for a warning or instruction. One of the policy grounds leading to the adoption of Rule 407 was that of "encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety." Notes of

Advisory Committee on 1972 Proposed Rules. Rule 407 has become an important element in product liability litigation, ensuring that manufacturers are not deterred from remedying potential defects by the threat of litigation. See, e.g., Kelly v. Crown Equip. Co., 970 F.2d 1273, 1277 (3d Cir. 1992) (evidence of postmanufacture, preaccident alterations in design of forklift was inadmissible); Petree v. Victor Fluid Power Inc., 831 F.2d 1191, 1198 (3d Cir. 1987) (evidence of warning decal affixed to presses manufactured after sale of press at issue, but prior to the accident, was not admissible).

This public policy is highly relevant in the context of year 2000 problems. It is a vital national concern that businesses evaluate their year 2000 problems in order to remedy them before they occur. This effort is hindered by the real fear of businesses that any evaluations undertaken by them may be turned and used against them in future litigation. A self-assessment privilege is necessary to provide businesses with the protection they need to feel comfortable in proceeding aggressively with self-evaluations, and thereby to encourage and promote such self-evaluation as a means to ensure year 2000 readiness.

The Prohibition of Multiple Punitive Damages Awards Would Also Encourage Businesses to Address Their Year 2000 Problems

I would next like to discuss the issue of punitive damages. The generally recognized purpose of punitive damages awards is to punish defendants and to deter future tortious, malicious conduct by the defendant and any other potential wrong-doers. See, e.g., BMW of N. Am. Inc. v. Gore, 517 U.S. 559, 568 (1996). Thus, as an initial matter, punitive damages awards would be inappropriate in the great majority of year 2000 litigation. Every business and organization, public or private, is affected by the year 2000 problem, which has arisen from an accepted industry practice, uniformly followed until very recently, of using two, instead of four,

digits, in programming date fields. As S.96 implicitly recognizes, the concept of punishment in this context is misplaced, without substantial evidence of a failure to act to avoid year 2000 computer problems beyond ordinary negligence. Further, since the year 2000 problem is a onetime only occurrence, the awarding of punitive damages in year 2000 litigation will serve no real deterrent function.

Thus, the measures taken in the Y2K Act to limit damages, with the exception of economic loss, and to ensure that defendants who have acted in good faith or merely negligently may not be subject to punitive damages awards, seem appropriate in the context of the year 2000 problem. Without reasonable limits on potential liability, many businesses may be reluctant to evaluate their year 2000 readiness and share information about their year 2000 readiness and compliance status. The Year 2000 Information and Readiness Disclosure Act took one step to address this problem by providing incentives for the sharing of information by providing an evidentiary exclusion and protecting defendants from liability for inaccurate statements about their year 2000 problems made to third parties in good faith. Despite the limited immunities provided in this earlier legislation, however, businesses may continue to fear that such information may be used against them in litigation, subjecting them to excessive punitive damages awards. The Y2K Act's limitations on damages are an important further step to meet the vital goal of encouraging businesses to address their year 2000 problems and to cooperate to ensure their readiness.

In its deliberations on this legislation, the Committee might consider an additional step provi ding that punitive damages, if any, may only be awarded once against a particular defendant for the same course of conduct. It is important to remember that the purpose of punitive damages is not to compensate plaintiffs, but to punish and deter defendants. Plaintiffs' injuries

are addressed by their compensatory damages; punitive damages to plaintiffs are, as the courts describe, windfalls. See,,e.g., Newport v. Fact Concerts Inc., 453 U.S. 247, 266-67 (1981); Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 17 (Tex. 1994). Thus, the measure I suggest -limiting punitive damages, if any, to one award - is a logical step in keeping with the purpose of punitive damages to punish and deter defendants, rather than to enrich any particular plaintiff.

The rise in mass tort litigation has led to a situation in which multiple punitive damages awards are assessed against a defendant for a single course of conduct. For example, thousands of personal injury lawsuits have been filed against manufacturers of mass-marketed products such as asbestos, diethyistilbestrol (DES), intrauterine contraceptive devices, and automobiles. See, e.g., In re School Asbestos Litig., 789 F.2d 996, 1003-04 (3d Cir. 1986); In re Northern Dist. of California "Dalkon Shield" IUD Prods. Liab. Litig., *526* F. Supp. 887, 892 ~.D. Cal. 1981), *vacated,* 693 F.2d 847 (9~ Cir. 1982); In re "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762 (E.D.N.Y. 1980). Disastrous occurrences such as airplane crashes and other large-scale disasters also have resulted in mass tort litigation. See, eg, In re Paris Air Crash, 622 F.2d th 1315 (9 Cir. 1980); In re Federal Skywalk Cases, 680 F.2d 1175 (8~ Cir. 1982). Thus, defendants are faced with the prospect of repeated punishment for a single course of conduct. This has led to challenges that at some point, the aggregate amount of multiple punitive damages awards becomes fundamentally unfair in violation of the due process clause. The aggregate effect of such awards may go far beyond their purpose to punish and deter, raising the due process concern. See, e.g. Pacific Mut. Life Ins. Co. v. Haslip,, 499 U.S. I, 22 (1991) (indicating that punitive damages awards must be limited so that they are not "greater than reasonably necessary to punish and deter.").

Businesses with year 2000 problems would be vulnerable to multiple suits for a single course of conduct. For example, a manufacturer of non-compliant software may be the subject of suit by each purchaser of the software. Further, a single computer failure may have multiple repercussions in different arenas, leaving, for example, the manufacturer of non-compliant software open to suit not only by purchaser plaintiffs, but also by shipper/receivers, the unhappy ultimate customer, and any business partners who incorporated the software in their own products.

While the problem of multiple punitive damages awards may be addressed by individual courts through the use of class actions, or, at times, the limitation of punitive damages to one award, including a provision in the Y2K Act would provide uniformity to the resolution of year 2000 lawsuits. The equity of limiting punitive damages in the context of year 2000 suits, moreover, is even more clear than in typical mass tort litigation, which can involve personal physical injuries. Here, the Y2K Act does not include within its reach actions seeking relief for physical injury or wrongful death. Further, the Y2K Act of course provides that, in all cases, any plaintiff will be entitled to receive damages for its full economic loss and thus be fully compensated.

Thus, particularly in this context - where the dual goals of punishment and deterrence are not applicable in the traditional sense, and may not be appropriate at all - it is important that punitive damages not be out of proportion to economic loss and not be a looming threat that would prevent businesses from sharing information that could subject them to potentially excessive punitive damages awards. Including a provision in the Y2K Act limiting punitive damages to one award for one course of conduct would further the goals of the Y2K Act, as set forth by Chairman McCain - "to provide incentives for fixing the potential Y2K failures before

they happen, rather than create windfalls for those who litigate." 145 Con~. Rec. *S531* (daily ed. January 20, 1999) (statement of Sen. McCain). Of course, providing that there shall be only one punitive damages award may have unintended consequences - such as a "race to the courthouse" by potential plaintiffs hoping to be the one to collect the award. That later plaintiffs may not be able to collect a punitive damages award is truly irrelevant, given the purpose of punitive damages awards to punish and deter defendants, rather than to enrich plaintiffs. However, to further support the goal of preventing a windfall for any particular plaintiff and to promote an equitable distribution among plaintiffs, I would suggest that all plaintiffs who have been successful in litigation by a date certain be entitled to share in the punitive damages award on a pro rata basis corresponding to the size of their economic damages.

Conclusion

It is of vital national concern that businesses do all that is necessary to ensure year 2000 readiness. This includes undertaking self-evaluations of their year 2000 problems and the sharing between businesses of information as to their readiness and tools and strategies for becoming year 2000 compliant. Unfortunately, these necessary efforts are hindered by the real threat of litigation and excessive punitive damages awards. The Y2K Act is an important step in removing some of the deterrents that businesses face in striving to become year 2000 compliant. The two additional measures I have suggested - establishing a self-evaluative or self-assessment privilege and limiting punitive damages to one award for a single course of conduct - would further the Y2K Act's goals of encouraging businesses to fix their year 2000 problems before they occur.

Mr. Chairman and Distinguished Members of the Committee, this concludes my testimony. I would be pleased to respond to any questions you may have.